IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 18 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BANK OF BARODA - Applicant(s)

Versus

MENUBHAI JIVANJI PATEL & 2 - Opponent(s)

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Appearance :

MR INDRAVADAN PARMAR for Applicant(s) : 1,
MR CHIRAG B PATEL for Opponent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 18/10/2005

ORAL JUDGMENT

1. Heard ld. Counsel Mr. Indravadan Parmar for the petitioner. There is no resistance from the other side.

2. By filing present Civil Revision Application and invoking jurisdiction of this Court under Section 115 of

CPC, the petitioner has challenged the legality and validity of the order passed below application Exh.33 submitted by the original defendant No.1 dated 21.09.2004 whereby the ld. Civil Judge (S.D.), Valsad dismissed Special Civil Suit No.124/1997. The said suit was filed for recovery of Rs.6,72,331=00 against loan granted by the Bank against the original debtor and two guarantors.

3. The grievance expressed by the defendant No.1 before the lower Court in the application exh.33 was that the plaintiff had failed in serving the summons to him as contemplated under the scheme of Rule 5(1) of Order 9 of CPC. Undisputedly, the Court has privilege to dismiss the suit for default if the plaintiff fails in paying the process fees for service of summons. However, here in the present case, there are more than one documents which clearly shows and suggests that desperate attempts were made by the plaintiff Bank to see that defendant no.1 is served. Three defendants have been prosecuted by the plaintiff and two of them were served and had appeared before the Court as party defendants, but they had not filed their formal written statement. It is contended in the CRA by the petitioner Bank that defendant No.1 was out of India and was not available for service even at this residence, in a the village and so the plaintiff

Bank could not serve summons to him, but on return of defendant No.1 back to India, the Bank served the process. After service of the process, defendant No.1 appeared and approached the court with one application i.e. exh.33 that the suit against him be dismissed and it was argued before the lower Court that the entire suit requires to be dismissed on account of failure in paying process fees and serving the summons to the party-defendants. The ld. Trial Judge has not applied mind on the point whether the suit against unserved defendant No.1 only could have been dismissed. There is some force in the arguments of ld. Counsel Mr. Parmar appearing for the petitioner Bank that the provisions of Sub Rule (1) of Rule 5 of Order 9 of CPC is directory leaving large discretion and it should be read in reference to the context of entire scheme.

4. Having considered the relevant provisions of CPC, it clearly emerges that it is the privilege of the Court to dismiss the suit if the Court finds that the plaintiff is negligent in serving the process and that negligence is persistent. At this stage, I would like to quote relevant observations made by the High Court of Delhi in the case of **New Bank of India v/s Sunil Dua, (1988) 2 Current Civil Cases 1 (A.N. Saha's Civil Procedure Code, 5th**

Edition.1015), wherein the Delhi High Court has observed that powers of dismissal of the suit under rule (2) of Order 9 of CPC should be exercised only in the cases where the Court finds persistent and gross negligence of the plaintiff for serving summons to the other side. This ratio will help the present petitioner Bank.

5. Ld. Counsel Mr. Parmar has also placed reliance on one decision of this Court in the case of **Shree Sanand Textile Industries Ltd. & Anr. V/s M/s Naranji Peraj Transport Co., AIR 1996 Gujarat 107 (= 1995(2) GLH 61)** wherein this Court has observed in paras 22 & 24 as under:-

> "22. Therefore, while interpreting language of Order 9 Rule 5 of the C.P.Code as directory, in my opinion, this court can in its revisional jurisdiction interfere with order dismissing the suit of the plaintiff as such order would result into defeating and subverting justice rather than doing justice. From the application tendered by petitioner-plaintiff on the very day for restoration of the suit and setting aside the dismissal it becomes clear that there was "sufficient cause" which would justify extension of time and issuance

of fresh summons on the defendant and, therefore,the learned Chamber Judge did not act judiciously with the desire to do justice, but rather acted with the object of disposing of a docket, least realising thereby that he was totally non-suiting plaintiff. Such an order in case of totally negligent and indifferent plaintiff who has been found sleeping over his right (as was the case before the Calcutta High Court), undoubtedly, the order of dismissing the suit is absolutely essential and must be passed, but to pass such order non-suiting plaintiff on the very first occasion after summons on the defendant was returned unserved, in my opinion, would amount to injudicious exercise of power. It would render a wholesome and salutary provision into a machine of oppression. Therefore, while holding that provisions of Order 9 Rule 5 of the CP Code are directory, in my opinion, the Court shall have to exercise the powers judiciously."

It has been further observed in para-24 as under:-

"24. However, in my opinion, on interpretation of Rule 5 Order 9, the learned Chamber Judge of the City Civil Court was not justified in dismissing

the suit. The provision of Rule 5 of Order 9 are simply enabling provision giving discretion to the court to dismiss the suit. Viewed from that angle, it was not obligatory upon the Chamber Judge to dismiss the suit on 14th Dec.1988 when the matter was posted before him with endorsement that summons to the defendant is returned unserved since 14th Oct.1988. In the application for setting aside the dismissal filed by the plaintiff, the cause is shown by the advocate of the plaintiff as to how there was lapse on the part of the plaintiff in moving the court within 30 days. On the date of return of the summons, the clerk of the advocate of the plaintiff has by mistake wrongly noted that the summons were already served and that application for adjournment is received. In fact, this wrong endorsement was made in connection with another suit number. It is this mistake committed by the clerk of the advocate of the plaintiff that the plaintiff failed to take action within 30 days as stipulated by Rule 5 of Order 9. Therefore, the court could have entertained such application and could have passed order which could be passed under Order 9 Rule 5 of the C.P.Code. Since the Court has discretion in the matter, dismissal of the suit was not justified and,

therefore, the order passed by the learned Chamber Judge on 14th Dec.1988 dismissing the suit under Order 9 Rule 5 is required to be quashed and set aside, is hereby quashed and set aside. ......"

Ld. Counsel Mr. Parmar for the petitioner has also placed reliance on the observations made by the Apex Court in para-11 in the case of **V.Raja Kumari v/s P. Subbarama Naidu & Another, (2005) 124 Company Cases 01,** and submitted that the same would be squarely applicable to the facts of the present case, wherein the Apex Court has observed as under:-

"11. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader, and clips an honest payee as that would defeat the very legislative measure."

6(i) Here in the present case, the defendant No.1 who have been served with summons by the plaintiff Bank, appears, even files his written statement and says that the suit against him should be dismissed because on earlier occasion, certain defaults were committed by the plaintiff Bank in serving the process. The approach of the ld. Civil Judge is found strange and contrary to the intention of the legislature. Privilege of the Court to dismiss the suit on account of some procedural default in a given compelling circumstance does not confer any right to the defendants or any party who opts to get the suit dismissed on such a technical plea rather than resisting it on merits. It is a matter of surprise also for the Court that there was no reason for the ld. Civil Judge to dismiss the suit against all the defendants including those who were already served and have failed in filing their respective written statements. On the contrary, a decree against defendant nos. 2 & 3 under O.8, R.10 of CPC could have been passed closing the right of these two defendants to file written statement, because it was legally possible to pass decree in view of the nature of the suit filed by the Bank.

(ii) For want of proper service, in some cases, the

plaintiff can continue the suit against other served defendants. In a case reported in **Nathabhai Tricamlal v/s Ranchodlal Bamji & Anr., AIR 1914 Bombay 242,** it has been held by the Bombay High Court as under:-

> " We think that the striking off of defendant 1's name was a procedure under O.9 R.5, rather than O.23, R.1. And all the authorities in all the Courts of India who have had this question under consideration, although they differed upon another point, are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under O.9 R.5, does not discharge the surety, provided the suit be still in time against the principal. That being so and confining our decision to that ground alone, we think that the order of the learned Judge below dismissing the suit was wrong."

So, there was no scope of dismissal of the suit against all the defendants. The ratio of the decision in the case of **Electrical Industries Corporation v/s Punjab National Bank & Ors.,AIR 1979 Calcutta 8,** would not help the other side. Hence, without making any further comments on the sustainability of the order, this Court

is inclined to allow this petition.

7. For the reasons aforesaid, the petition is allowed. The impugned order passed by the ld. Civil Judge is hereby quashed and set aside. Consequently, therefore, the decree drawn treating the suit dismissed also can not sustain and the same is also hereby quashed and set aside. Special Civil Suit No.124/1997 is restored to the file of the Court of ld. Civil Judge (S.D.) concerned and the same shall be heard and decided on merits and in accordance with law. It is relevant to note that no formal resistance is filed by the other side in the present case, though served. Petition stands allowed accordingly. NO costs.

(C.K. BUCH, J)

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